

ROBBINS GELLER RUDMAN
& DOWD LLP
SHAWN A. WILLIAMS (213113)
SUNNY S. SARKIS (258073)
Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: 415/288-4545
415/288-4534 (fax)
shawnw@rgrdlaw.com
ssarkis@rgrdlaw.com
– and –

JULIE A. KEARNS (246949)
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)
jkearns@rgrdlaw.com

Lead Counsel for Plaintiffs

[Additional counsel appear on signature page.]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CURTIS AND CHARLOTTE WESTLEY,)	No. C11-02448-EMC
Individually and on Behalf of All Others)	and related consolidated action
Similarly Situated,)	(Lead Case No. C11-3176-EMC)
)	(Derivative Action)

Plaintiffs,

vs.

OCLARO, INC., et al.,

Defendants.

In re OCLARO, INC. DERIVATIVE
LITIGATION

Lead Case No. C11-3176-EMC
(Derivative Action)

This Document Relates To:

Westley v. Oclaro, Inc., et al.,
C11-02448-EMC.

DATE: May 16, 2013
TIME: 1:30 p.m.
COURTROOM: 5, 17th Floor
JUDGE: Hon. Edward M. Chen

CORRECTED PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION
TO DISMISS THE THIRD AMENDED COMPLAINT

TABLE OF CONTENTS

		Page
1		
2		
3	I. INTRODUCTION	1
4	II. LEGAL STANDARD.....	4
5	III. ARGUMENT	7
6	A. The TAC’s New, Detailed Facts from an Additional Former Employee	
7	Confirm and Corroborate Plaintiffs’ Previously Pleaded Allegations that	
8	Defendants Knew or Recklessly Disregarded Their July 29 and August 11,	
9	2010 Statements Were False and Misleading	7
10	B. Each of Defendants’ Statements Held by the Court to Be Materially False	
11	and Misleading Issued Throughout the Class Period Concerned the	
12	Common Topic of Customer Demand.....	12
13	C. The TAC’s Additional Motive Allegations Further Support a Strong	
14	Inference of Scienter	13
15	IV. PLAINTIFFS RESPECTFULLY REQUEST LEAVE TO AMEND	14
16	V. CONCLUSION.....	14
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

Page

CASES

<i>Bell Atlantic v. Twombly</i> , 550 U.S. 544 (2007)	6
<i>Berson v. Applied Signal Tech., Inc.</i> , 527 F.3d 982 (9th Cir. 2008)	3, 13
<i>Chavez v. Bank of Am. Corp.</i> , No. C-10-0653 JCS, 2012 U.S. Dist. LEXIS 62935 (N.D. Cal. May 4, 2012)	4
<i>Gonzalez v. Ariz.</i> , 677 F.3d 383 (9th Cir. 2012)	6
<i>In re Cadence Design Sys., Inc. Sec. Litig.</i> , 692 F. Supp. 2d 1181 (N.D. Cal. 2010)	11
<i>In re Century Aluminum Co. Sec. Litig.</i> , 704 F.3d 1119 (9th Cir. 2013)	6, 7
<i>In re Century Aluminum</i> , No. 11-15599, 2013 U.S. App. LEXIS 7760 (9th. Cir. Apr. 17, 2013)	7
<i>In re Daou Sys.</i> , 411 F.3d 1006 (9th Cir. 2005)	1
<i>In re Diamond Foods, Inc., Sec. Litig.</i> , No. C 11-05386 WHA, 2012 U.S. Dist. LEXIS 170704 (N.D. Cal. Nov. 30, 2012)	7, 13
<i>In re Gilead Scis. Sec. Litig.</i> , 536 F.3d 1049 (9th Cir. 2008)	13
<i>In re Omnivision Techs. Sec. Litig.</i> , No. C-11-5235 RMW, 2013 U.S. Dist. LEXIS 46032 (N.D. Cal. Mar. 29, 2013)	11
<i>In re Scholastic Corp. Sec. Litig.</i> , 252 F.3d 63 (2d Cir. 2001)	11
<i>In re VeriFone Holdings, Inc. Sec. Litig.</i> , 704 F.3d 694 (9th Cir. 2012)	<i>passim</i>

1		
2		Page
3	<i>Matrixx Initiatives, Inc. v. Siracusano,</i>	
4	_U.S._, 131 S. Ct. 1309 (2011).....	5, 13
5	<i>N.M. State Inv. Council v. Ernst & Young LLP,</i>	
6	641 F.3d 1089 (9th Cir. 2011)	4, 5
7	<i>Plotkin v. IP Aress, Inc. Etc.,</i>	
8	407 F.3d 690 (5th Cir. 2005)	11
9	<i>S. Ferry LP v. Killinger,</i>	
10	542 F.3d 776 (9th Cir. 2008)	6, 10, 11
11	<i>Shaw v. Digital Equip. Corp.,</i>	
12	82 F.3d 1194 (1st Cir. 1996).....	14
13	<i>Starr v. BACA,</i>	
14	652 F.3d 1202 (9th Cir. 2011)	6, 7
15	<i>Tellabs, Inc. v. Makor Issues & Rights, Ltd.,</i>	
16	551 U.S. 308 (2007).....	4, 5, 6, 7
17	<i>Va. Bankshares, Inc. v. Sandberg,</i>	
18	501 U.S. 1083 (1991).....	3, 13
19	<i>WPP Lux. Gamma Three Sarl v. Spot Runner, Inc.,</i>	
20	655 F.3d 1039 (9th Cir. 2011),	
21	<i>cert. denied</i> , _U.S._, 132 S. Ct. 2713 (2012).....	13
22	<i>Zucco Partners, LLC v. Digimarc Corp.,</i>	
23	552 F.3d 981 (9th Cir. 2009)	7
24		
25		
26		
27		
28		

I. INTRODUCTION

This Court has undisputedly held that lead plaintiff Connecticut Laborers Pension Fund and named plaintiffs Curtis and Charlotte Westley (collectively, “plaintiffs”) have alleged with the requisite particularity under the Private Securities Litigation Reform Act of 1995 (“PSLRA”) that defendants¹ made materially false and misleading statements concerning customer demand throughout the May 6, 2010 through October 28, 2010 Class Period. *See* Order Granting Defendants’ Motion to Dismiss Second Amended Complaint, filed September 21, 2012 (Dkt. No. 79) (“September 21 Order”) at 7-13. This Court has further held plaintiffs have alleged with the requisite specificity that defendants acted with scienter when they issued materially false and misleading statements to the market concerning customer demand on May 6, 2010 and June 9, 2010. *See* Order Granting in Part and Denying in Part Plaintiffs’ Motion for Leave to File Motion for Reconsideration, filed January 10, 2013 (Dkt. No. 107) (“January 10 Order”) at 4-9. Thus, the only issue to be decided by the Court in considering plaintiffs’ Third Amended Complaint for Violation of the Federal Securities Laws, filed March 1, 2013 (Dkt. No. 121) (the “TAC”), is whether the TAC now adequately alleges that defendants’ false statements about customer demand on July 29, 2010 and August 11, 2010, which were already found to be materially false and misleading, were made with the requisite scienter.²

The Court has held plaintiffs have adequately alleged defendants misled investors in the documents accompanying Oclaro’s May 6, 2010 Secondary Offering of common stock by falsely stating the Company was “currently” and “recently” experiencing “increased” customer demand for Oclaro’s products. ¶¶46, 51.³ This May 2010 Secondary Offering has been publicly touted by

¹ “Defendants,” collectively refers to Oclaro, Inc. (“Oclaro” or the “Company”) along with Oclaro President, Chief Executive Officer (“CEO”) and director Alain Couder (“Couder”) and Chief Financial Officer (“CFO”) Jerry Turin (“Turin”).

² To state a §10(b) claim for securities fraud, plaintiffs must adequately allege: “(1) a material misrepresentation or omission of fact, (2) scienter, (3) a connection with the purchase or sale of a security, (4) transaction and loss causation, and (5) economic loss.” *In re Daou Sys.*, 411 F.3d 1006, 1014 (9th Cir. 2005).

³ All “¶__” or “¶¶__” references are to the TAC.

1 Company CFO Turin as “a ‘re-branding’ of Oclaro” (¶28), and the Court has recognized, as part of
 2 its scienter analysis, plaintiffs’ allegation that defendants were motivated to secure \$77 million in
 3 artificially inflated proceeds from the May 2010 Secondary Offering so that Oclaro could afford to
 4 execute the strategic acquisitions of ClariPhy and Mintera. *See* September 21 Order at 21, 27;
 5 January 10 Order at 4.

6 On the heels of Oclaro’s May 2010 Secondary Offering, CFO Turin and CEO Couder
 7 notably made efforts to convince investors in June, July and August 2010 that Company executives’
 8 close relationships with Oclaro’s concentrated pool of customers gave them unique and credible
 9 insight into their true needs and demand for the Company’s products. Defendants falsely assured
 10 investors on June 9, 2010 that they knew, based on these close customer relationships, that the
 11 strong, current customer demand was not the product of customers hoarding inventory or double
 12 ordering – an explicit analyst concern – and rather represented actual end-user demand. ¶¶53-54.

13 The Court has already undisputedly held defendants’ July 29 and August 11, 2010 statements
 14 were materially false and misleading based on the account of a Former Employee (“FE”) FE1, a
 15 former Executive Vice President of Sales at Oclaro during the relevant period. *See* September 21
 16 Order at 10-13. The Court found plaintiffs alleged enough detail about FE1 to demonstrate he/she
 17 was in a position to know about the facts he/she provided. *See id.* at 11-12 (“Defendants fail in any
 18 substantive way to establish why FE[1]’s statements are lacking in foundation. . . . Given that FE1
 19 was a former senior vice president responsible for all sales of Oclaro, it is a fair inference that he or
 20 she has knowledge about what visibility Oclaro had into customer’s needs.”); *id.* at 28 (“Plaintiffs
 21 have alleged enough to establish that FE1 was in a position within Oclaro with knowledge of
 22 Oclaro’s sales experiences and practices”).

23 Plaintiffs have added multiple new allegations to the TAC that further support the strong
 24 inference defendants acted with scienter when making the misstatements on July 29 and August 11,
 25 2010, as is discussed in further detail *infra*, including: (1) more substantive allegations by a new
 26 witness familiar with Oclaro’s sales and customer order practices; (2) more substantive and fulsome
 27 allegations concerning defendants’ extensive industry experience about which they boasted to the
 28 market; (3) more substantive allegations concerning defendants’ motive throughout the Class Period;

1 and (4) allegations confirming defendants' tendency to issue misleading statements – specifically
 2 illustrated by Couder's public statement on June 15, 2010 that defendants "ha[d] not seen any
 3 slowing down of 40Gbps," which was directly contradicted by his direct report Executive Vice
 4 President of Sales Scott Parker in late July 2010, when Parker publicly "conceded that the 40G space
 5 has been soft for a few quarters" (*see* ¶¶55, 59) – which defendants conspicuously fail to even
 6 mention in their Motion.

7 Significantly, the TAC has added the detailed account of FE2, who worked as Oclaro's
 8 Senior Manager of Product Marketing from June 2009 through July 2011, which further supports a
 9 strong inference of scienter – namely that defendants knew or deliberately disregarded their
 10 statements concerning order coverage and true strength of customer demand were false and
 11 misleading. *See* ¶84(j)-(k). According to FE2, who participated in monthly forecasting meetings
 12 attend by Oclaro executives, "order coverage" – a metric provided to the market by Couder and
 13 Turin on July 29 and August 11, 2010 in lieu of "absolute order level" figures requested by analysts
 14 – included "blanket orders," which were *not* actually firm orders that had been placed by customers.
 15 *Id.* Rather, "blanket orders" were customer commitments to place orders in the future – but were
 16 explicitly at heightened risk of cancellations due to "push outs" and "pull ins" clauses in these
 17 contracts. *Id.* Despite defendants' specific assurances to investors that "order coverage" of 85% to
 18 90% was already secured for the "September quarter," this fact was concealed from investors. *See*
 19 ¶¶67, 81; *see also Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1091 (1991) (investors expect
 20 corporate executives have knowledge and expertise about the company's business far exceeding the
 21 normal investor).⁴ And notably, in the Ninth Circuit, defendants are subject to a heightened duty to
 22 ensure they speak truthfully when they choose to publicly discuss specific topics – which, here, is
 23 the notion of Oclaro's "order coverage" metric. *See Berson v. Applied Signal Tech., Inc.*, 527 F.3d
 24 982, 987 (9th Cir. 2008). Deliberately disregarding, or even turning a "blind eye" to whether these

26 ⁴ Even prior to this addition to the TAC of FE2's specific account, the Court previously held
 27 plaintiffs' allegations were probative of scienter as to the July and August 2010 misstatements even
 28 if they did not quite meet the rigorous PSLRA pleading standards. *See* September 21 Order at 28-29.

statements were accurate, adequately establishes scienter in the context of pleading securities fraud. *In re VeriFone Holdings, Inc. Sec. Litig.*, 704 F.3d 694, 708 (9th Cir. 2012).

Furthermore, this Court has held defendants' false statements on July 29 and August 11, 2010 caused the Company's share price to remain artificially inflated until defendants' Class Period ending disclosures on October 28, 2010. *See* September 21 Order at 31-34.⁵ At that time, defendants disclosed facts that stood in sharp contrast to the assurances they had made to investors throughout the Class Period by announcing the Company had missed expectations for 1Q11 EPS by 95%, reporting \$0.01 per share compared to analyst estimates of \$0.22 per share, and that gross margins were 29% as opposed to the analyst consensus of 33%. ¶¶91-92. Critically, defendants also conceded that "visibility" into the need for Oclaro's products from its customers from both a current demand and forecast perspective, which they previously claimed was known to them based on close relationships with Oclaro's customers, was all of a sudden sharply limited and that the Company's customers' inventories had become bloated and required correction, resulting in order pushouts (delays) and/or cancellations. ¶¶91, 93, 96-97.

II. LEGAL STANDARD

In considering defendants' Motion, the Court "must, as with any motion to dismiss for failure to plead a claim on which relief can be granted, accept all factual allegations in the complaint as true." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *see also N.M. State Inv. Council v. Ernst & Young LLP*, 641 F.3d 1089, 1094 (9th Cir. 2011) (when reviewing a 12(b)(6) motion for failure to state a claim, "we will 'accept the plaintiffs' allegations as true and construe

⁵ Although defendants "respectfully and emphatically disagree with this Court's ruling that the Second Amended Complaint pleads a viable claim as to the May/June statements, or that the Second Amended Complaint adequately pleads the elements of falsity, materiality and loss causation as to the July/August statements," and in their Motion "reserve their position and arguments related to those issues" (*see* Defendants' Notice of Motion and Motion to Dismiss the Third Amended Complaint for Violation of the Federal Securities Laws and Memorandum of Points and Authorities (Dkt. No. 130) ("Motion" or "MTD") at 1 n.2), the law of the case applies. *See Chavez v. Bank of Am. Corp.*, No. C-10-0653 JCS, 2012 U.S. Dist. LEXIS 62935, at *12-*13 (N.D. Cal. May 4, 2012).

1 them in the light most favorable to plaintiffs,’ and will hold a dismissal inappropriate unless the
 2 complaint fails to ‘state a claim to relief that is plausible on its face’”).⁶ While the PSLRA may have
 3 “‘significantly altered pleading requirements in private securities fraud litigation,’ . . . it did not
 4 impose an insurmountable standard.” *VeriFone*, 704 F.3d at 708.

5 Scier as to defendants’ materially false and misleading statements made on July 29 and
 6 August 11, 2010 can be established by intent or knowledge, but “deliberate recklessness” or
 7 “conscious recklessness” also satisfies the standard. *Id.* at 702-03, 708. And the Ninth Circuit
 8 confirmed just months ago that “[r]ecklessly turning a ‘blind eye’ to impropriety is equally culpable
 9 conduct under Rule 10b-5.” *Id.* at 708. Finally, the Ninth Circuit has also held “complacency” as to
 10 the accuracy of defendants’ material statements “can be described only as willful at this stage of the
 11 pleadings” – and thus can serve to establish a strong inference of scier. *VeriFone*, 704 F.3d at
 12 706.

13 A “strong inference” of scier is one that a reasonable person would deem “cogent and at
 14 least as compelling as any opposing inference one could draw from the facts alleged,” but need not
 15 be “the ‘most plausible of competing inferences.’” *Tellabs*, 551 U.S. at 324; *see also Matrixx*
 16 *Initiatives, Inc. v. Siracusano*, __U.S.__, 131 S. Ct. 1309, 1313 (2011); *VeriFone*, 704 F.3d at 701.
 17 The Ninth Circuit recently reiterated the Supreme Court authority set forth in *Tellabs*, stating the
 18 “relevant inquiry” in assessing scier is “‘whether *all* of the facts alleged, taken collectively, give
 19 rise to a strong inference of scier, not whether any individual allegation, scrutinized in isolation,
 20 meets that standard.’” *VeriFone*, 704 F.3d at 701 (emphasis in original); *see also N.M. State*, 641
 21 F.3d at 1095. The Ninth Circuit specifically cautioned against “the risk” and “potential pitfalls”
 22 involved in analyzing scier allegations individually, and thus employs “a holistic review of [a
 23 complaint’s] allegations to determine whether they combine to create a strong inference of
 24 intentional conduct or deliberate recklessness.” *VeriFone*, 704 F.3d at 703. And critically, in
 25
 26

27 ⁶ All internal citations are omitted throughout unless otherwise noted.
 28

1 “assessing [scienter] allegations holistically as required by *Tellabs*, the federal courts certainly need
 2 not close their eyes to circumstances that are probative of scienter viewed with a practical and
 3 common-sense perspective.” *S. Ferry LP v. Killinger*, 542 F.3d 776, 784 (9th Cir. 2008).

4 Defendants rely on *In re Century Aluminum Co. Sec. Litig.*, 704 F.3d 1119, 1122-23 (9th
 5 Cir. 2013) for a standard inconsistent with Supreme Court authority in *Tellabs* as well as binding
 6 Ninth Circuit authority. Defendants cite *Century Aluminum* for the proposition that:

7 “When faced with two possible explanations, only one of which can be true and only
 8 one of which results in liability, plaintiffs cannot offer allegations that are ‘merely
 9 consistent with’ their favored explanation but are also consistent with the alternative
 10 explanation. Something more is needed, such as facts tending to exclude the
 possibility that the alternative explanation is true, in order to render plaintiffs’
 allegations plausible”

11 *See* MTD at 5. But as plaintiffs noted in Lead Plaintiff’s Response to Defendants’ January 4, 2013
 12 Statement of Recent Authority (Dkt. No. 104), this isolated statement of law – notably, in a case
 13 solely examining the issue of plaintiffs’ standing in §11 case – stands in direct contrast with the
 14 Ninth Circuit’s prior holding in *Starr v. BACA*, 652 F.3d 1202, 1216-17 (9th Cir. 2011) on the
 15 identical interpretation of *Bell Atlantic v. Twombly*, 550 U.S. 544, 556 (2007):

16 If there are two alternative explanations, one advanced by defendant and the other
 17 advanced by plaintiff, both of which are plausible, plaintiff’s complaint survives a
 18 motion to dismiss under Rule 12(b)(6). Plaintiff’s complaint may be dismissed only
 19 when defendant’s plausible alternative explanation is so convincing that plaintiff’s
 20 explanation is ***implausible***. The standard at this stage of the litigation is not that
 21 plaintiff’s explanation must be true or even probable. The factual allegations of the
 complaint need only “plausibly suggest an entitlement to relief.” As the Court wrote
 in *Twombly*, Rule 8(a) “***does not impose a probability requirement at the pleading
 stage***; it simply calls for enough fact to raise a reasonable expectation that discovery
 will reveal evidence” to support the allegations. Starr’s complaint satisfies that
 standard.

22 *Id.* (emphasis in original). The prior ruling by the Ninth Circuit in *Starr* interpreting the application
 23 of the Supreme Court’s ruling in *Twombly* is the law of the circuit and may ***not*** be overruled by the
 24 subsequent three judge panel in *Century Aluminum* (see *Gonzalez v. Ariz.*, 677 F.3d 383, 389 n.4
 25 (9th Cir. 2012) (the Ninth Circuit, ruling *en banc*, reaffirmed the law of the circuit rule that “a
 26 published decision of this Court constitutes binding authority which ‘must be followed unless and
 27 until overruled by a body competent to do so’”), and because it is inconsistent with *Starr*, the
 28 *Century Aluminum* case is not binding on the interpretation of competing inferences under *Twombly*.

1 *See also Tellabs*, 551 U.S. at 324 n.5, 328-29 (2007) (ties or “as likely” conflicting inferences of
 2 scienter are construed in plaintiffs’ favor). It therefore comes as no surprise that upon
 3 plaintiffs’/appellants’ petition for rehearing or rehearing *en banc* as to the *Century Aluminum*
 4 opinion – based largely on its irreconcilable inconsistency with the Ninth Circuit’s prior *Starr*
 5 opinion – the Ninth Circuit ordered defendants/appellees to file a response to the petition.
 6 Defendants in *Century Aluminum* filed their response on February 19, 2013; the court has yet to
 7 issue a decision on the matter.⁷

8 **III. ARGUMENT**

9 **A. The TAC’s New, Detailed Facts from an Additional Former Employee** 10 **Confirm and Corroborate Plaintiffs’ Previously Pleaded Allegations** 11 **that Defendants Knew or Recklessly Disregarded Their July 29 and** 12 **August 11, 2010 Statements Were False and Misleading**

13 In the context of pleading securities fraud in the Ninth Circuit, confidential witness accounts
 14 support a strong inference of scienter where: (1) “the complaint . . . provide[s] an adequate basis for
 15 determining that the witnesses in question have personal knowledge of the events they report”; and
 16 (2) the witness accounts “themselves [are] indicative of scienter.” *In re Diamond Foods, Inc., Sec.*
 17 *Litig.*, No. C 11-05386 WHA, 2012 U.S. Dist. LEXIS 170704, at *17-*18 (N.D. Cal. Nov. 30, 2012)
 18 (quoting *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 995 (9th Cir. 2009)). In analyzing
 19 whether a witness would possess the information alleged, the Court must consider, among other
 20 things, “the level of detail provided by the confidential sources, the corroborative nature of the other
 21 facts alleged (including from other sources), [and] the coherence and plausibility of the allegations.”
 22 *Zucco*, 552 F.3d at 995.

23 This Court has already held that FE1, a former Oclaro Senior Vice President of Sales during
 24 the relevant time frame who reported directly to Couder, was in a position to know the facts set forth
 25 in his account. *See* September 21 Order at 11-12 (“Defendants fail in any substantive way to

26 ⁷ On April 17, 2013, subsequent to plaintiffs’ April 15, 2013 instant opposition to defendants’
 27 Motion (Dkt. No. 146), the Ninth Circuit issued an Order and Amended Opinion in *Century*
 28 *Aluminum (In re Century Aluminum*, No. 11-15599, 2013 U.S. App. LEXIS 7760 (9th Cir. Apr. 17,
 2013)), holding that in light of the facts in that case, its previous decision in *Century Aluminum*, 704
 F.3d 1119, was not inconsistent with its opinion in *Starr*, 652 F.3d 1202.

1 establish why FE1's statements are lacking in foundation. . . . Given that FE1 was a former senior
 2 vice president responsible for all sales of Oclaro, it is a fair inference that he or she has knowledge
 3 about what visibility Oclaro had into customer's needs."); *id.* at 28 ("Plaintiffs have alleged enough
 4 to establish that FE1 was in a position within Oclaro with knowledge of Oclaro's sales experiences
 5 and practices"). The Court recognized FE1's account confirmed "Oclaro's customers were often
 6 reluctant to provide detailed information about their own needs so that suppliers like Oclaro would
 7 not dedicate manufacturing capacity to other customer's needs" (*see* September 21 Order at 11) – a
 8 fact specifically alleged by plaintiffs to be known to Couder and Turin (*see* ¶¶84(c), (e)) and also
 9 now corroborated in the TAC by Turin's false assurance defendants knew customers were not
 10 "hedg[ing] their bets" in this exact manner (*see* ¶83). According to FE1, any meaningful visibility as
 11 to customer demand or order trends was realistically only possible for a couple weeks out, with
 12 orders that were scheduled for delivery between 14 and 30 days out being a "reach," and beyond
 13 that, a "crap shoot." ¶84(i). As such, defendants knew or recklessly disregarded that current order
 14 levels, which were a component of Oclaro's "order coverage" for the "September quarter," were at a
 15 known risk of cancellation that only increased for orders scheduled to be delivered beyond two
 16 weeks out. ¶67.

17 Furthermore, the Court's recognition that according to FE1, these facts were known to those
 18 experienced in the Company's industry was "Plaintiffs' strongest allegation on scienter" (*see*
 19 September 21 Order at 29) – yet nevertheless fell just short of passing the stringent PSLRA pleading
 20 hurdles. The Court found that even though plaintiffs had adequately alleged defendants knew close
 21 customer relationships did not translate into knowledge of customer order strength, they fell short of
 22 alleging with particularity that defendants did not know about customer orders or demand in the
 23 future. *Id.*

24 But FE1 has specifically and consistently stated that Couder and Turin knew these
 25 contradictory facts, rather than relying on industry experience alone or "assum[ing] the individual
 26 defendants were experienced in the industry by virtue of their position[s] alone." *See* September 21
 27 Order at 29. Yet in light of the Court's characterization of this being plaintiffs' "strongest allegation
 28 on scienter," the TAC now specifically alleges Couder's and Turin's extensive expertise in the

1 industry – a fact they themselves have touted to the public. Couder boasts on his LinkedIn page, for
 2 example, of his “industry expertise” in “optical components,” describing Oclaro as an “optical
 3 components public company with a major focus on . . . consumer markets.” ¶24. Oclaro’s
 4 September 9, 2010 Proxy Statement for the Annual Meeting of Stockholders, incorporated by
 5 reference into the Company’s FY10 Form 10-K filed with the SEC on September 1, 2010, stated,
 6 “Mr. Couder’s experience, through nearly 8 years of executive officer service with companies in a
 7 high growth phase, gives him a unique perspective on the Company’s business.” ¶25. Similarly,
 8 Turin touted on Oclaro’s predecessor Bookham’s website that he had “more than 20 years of
 9 combined accounting and corporate finance experience in the technology industry.” ¶27. And on
 10 his LinkedIn page, he labeled himself as the Company executive that: “Rolled out the Oclaro story to
 11 the investor community.” ¶28. Finally, highlighting the significance of the Company’s May 2010
 12 Secondary Offering to its overall financial success, Turin further takes credit for having “[r]aised
 13 \$75M in a 2010 secondary offering, conducted as a ‘re-branding’ of Oclaro.” *Id.*

14 The TAC now also alleges specific facts reported by FE2, Oclaro’s former Senior Manager
 15 of Product Marketing from June 2009 to July 2011 (including during the Class Period). ¶84(j). As
 16 part of his/her job responsibilities at the Company, FE2 participated in monthly forecasting meetings
 17 attended by Oclaro executives wherein FE2 provided general sales forecasting information as well as
 18 specific insight into the circumstances of product orders during the summer of 2010. *Id.* These
 19 monthly meetings were typically attended by Oclaro’s Executive VP of Sales Scott Parker – the
 20 Company’s highest ranking sales executive that was as senior as CFO Turin – and also, at times,
 21 CEO Couder and Chief Operating Officer James Haynes. *Id.* Notably, FE2 was ranked high enough
 22 in Oclaro’s management to attend and contribute to meetings also attended by the CEO of the
 23 Company. *Id.* FE2’s detailed account supports the strong inference defendants knew, or were at
 24 least severely reckless in not knowing or turning a culpable “‘blind eye’” (*see VeriFone*, 704 F.3d at
 25 708) that their statements about “order coverage” were false and misleading because that coverage
 26 included “blanket orders.” ¶84(j)-(k); *see also* ¶84(l).

27 According to FE2, “blanket orders” were not actual firm orders that had been placed by
 28 customers, but rather were mere commitments to place orders in the future – often times at explicit

1 risk of cancellation, (as the contracts typically contained “push outs” or “pull ins” clauses). ¶84(k).
 2 Nevertheless, these soft customer commitments were included in the Company’s “order coverage”
 3 provided to investors by Turin and Couder, with the express purpose of justifying their assurances of
 4 strong end-user (*i.e.*, true) demand – a fact concealed from investors, even as analysts requested and
 5 defendants outright refused to provide “absolute level of orders.” ¶¶13, 67, 84(k). Critically,
 6 according to FE2, the inclusion of blanket orders in Oclaro’s order coverage provided the basis for
 7 defendants’ public “bullishness” during the summer of 2010. ¶¶84(k).

8 If in fact order coverage included blanket orders that had not actually been placed, as
 9 plaintiffs have pleaded with specificity based on the account of FE2, this is a major issue defendants
 10 must have known about. The core operations theory can be enough to establish scienter “where the
 11 nature of the relevant fact is of such prominence that it would be ‘absurd’ to suggest that
 12 management was without knowledge of the matter.” *S. Ferry*, 542 F.3d at 786. Moreover, Couder
 13 even labels himself on his LinkedIn page as the “Active Chairman and CEO of Oclaro which he built
 14 through M&A.” ¶24. This not only further reinforces how critical the ClariPhy and Mintera
 15 acquisitions were to the Company, but also critically evidences the involved management style of
 16 Oclaro executives. And furthermore, the fact that defendants were personally involved in close
 17 customer relationships also evidences a style of hands-on management as it relates to customer needs
 18 and demand that supports a strong inference of scienter. *See VeriFone*, 704 F.3d at 710 (“the
 19 complaint alleges in detail that [the executive defendants] were hands-on managers with respect to
 20 operational details and financial statements” (citing *Daou*, 411 F.3d at 1022)); *see also* ¶54
 21 (statement by Turin on June 9, 2010: “we’re pretty close to our customers and pretty close to what
 22 they’re doing from a forecast and volume point of view”); ¶83 (statement by Turin on August 11,
 23 2010: “Also, we’re very close to our customers. The customer base we support are the major
 24 telecomm equipment companies and that’s a close relationship. If I had 500 customers of the same
 25 size and you couldn’t drill down to the different areas within the business, you would have less
 26 visibility. But we have a great deal of visibility with these guys.”). Couder even assured the market
 27 he personally communicated with Oclaro’s customers, partially attributing the “bullish” 1Q11
 28 guidance issued by defendants on July 29, 2010 to Oclaro’s acquisition of Mintera, and stating “I got

1 15 e-mail[s] back from customer[s], this was great because they like the Mintera technology and
 2 they want to work with us.” ¶68. At minimum, as was the case in *VeriFone*, here: “At the very
 3 least, both executives were on notice that there might be issues” or problems with providing order
 4 coverage as representing actual, firm orders placed, yet “disclosed neither concern to investors. To
 5 the contrary, [CEO defendant] reassured investors and analysts” – falsely– that was the most
 6 meaningful indicator of the customer demand. 704 F.3d at 710.

7 These allegations support a strong inference of actual knowledge or, at the very least,
 8 deliberate recklessness – and thus, defendants’ scienter as to their July and August 2010 statements.
 9 *See, e.g., Plotkin v. IP Axess, Inc. Etc.*, 407 F.3d 690, 700 (5th Cir. 2005) (given the reasonableness
 10 of the inference that defendant possessed material facts casting doubt on credibility of facts
 11 underlying the allegedly false statement, scienter was adequately alleged); *In re Scholastic Corp.*
 12 *Sec. Litig.*, 252 F.3d 63, 76 (2d Cir. 2001) (“Where the complaint alleges that defendants knew facts
 13 or had access to non-public information contradicting their public statements, recklessness is
 14 adequately pled for defendants who knew or should have known they were misrepresenting material
 15 facts with respect to the corporate business.”); *S. Ferry*, 542 F.3d at 784-86 (scienter may be inferred
 16 where the complaint alleges that management was in position to be exposed to factual information
 17 within the company that rendered the statements false); *In re Cadence Design Sys., Inc. Sec. Litig.*,
 18 692 F. Supp. 2d 1181, 1188 (N.D. Cal. 2010) (allegations that the individual defendant was involved
 19 in every large contract is sufficient to adequately allege scienter of false earnings statements).

20 Even if “shortcomings” may exist in the plaintiffs’ core operations allegations “**when viewed**
 21 **in isolation**,” when “[v]iewing the Complaint as a whole,” – which is required – “the court can infer
 22 that [defendant] had sufficient core operations knowledge.” *In re Omnivision Techs. Sec. Litig.*, No.
 23 C-11-5235 RMW, 2013 U.S. Dist. LEXIS 46032, at *60-*61 (N.D. Cal. Mar. 29, 2013) (emphasis in
 24 original).
 25
 26
 27
 28

B. Each of Defendants' Statements Held by the Court to Be Materially False and Misleading Issued Throughout the Class Period Concerned the Common Topic of Customer Demand

Defendants' materially false and misleading statements issued throughout the Class Period (on May 6, June 9, July 29 and August 11, 2010) were each related to and designed to give investors a false picture of true customer demand. On June 9, 2010, defendants assured investors they knew the strong customer demand of which they boasted was real, end-user demand based on them being "pretty close to customers and pretty close to what they're doing from a forecast and volume point of view." ¶¶54; *see* ¶¶53-54. Then on July 29, 2010 – just eight days after Oclaro announced the acquisition of Mintera, made possible by the receipt of artificially inflated proceeds from the Company's May 2010 Secondary Offering – defendants disclosed orders had declined so dramatically during the month of April 2010 that Oclaro's quarterly book-to-bill ratio for the quarter ending June 2010 had plummeted. ¶¶67, 72. Despite this negative announcement of a slowdown in customer demand, defendants blatantly attempted to appease the market by assuring investors defendants were still "very bullish . . . because the demand is there," which was based on "order coverage" of between "85% and 90%" needed to meet the increased 1Q11 forecasts issued that day.⁸ ¶¶67-68. But, as was reported by FE2, this "order coverage" also included blanket orders that were actually only promises by customers to place future orders and were known to be at a higher risk of cancellation. ¶84(k). In direct contradiction to these facts, defendants successfully led the market to believe order coverage consisted of firm orders, purportedly known to defendants to have minimal risk of cancellation – rather than blanket orders (per FE2) or orders meaningfully susceptible to cancellation two weeks out (per FE1). *See* ¶75 (July 30, 2010 analyst report stating Oclaro "Management has countered that order coverage in the current quarter [1Q11] already stands at more

⁸ Defendants were also "very bullish . . . because the demand is there" to meet 1Q11 guidance for the products Oclaro acquired along with the strategic acquisitions of ClariPhy and Mintera – which plaintiffs have consistently alleged were executed using artificially inflated proceeds from the May 2010 Secondary Offering based on false statements therein concerning currently and recently increasing customer demand. *See* ¶¶67-68.

1 than 85% so visibility remains strong”); ¶79 (July 30, 2010 analyst report covering Oclaro: “With
2 roughly 85% of the quarter already in hand in the form of hard orders”).

3 On August 11, 2010, when defendants were again questioned about the true strength and
4 firmness of customer demand, they gave the same answer – that Oclaro “[a]s of last week [was] 90%
5 order covered for this quarter, which is an extraordinary level for our business.” ¶81. When
6 specifically asked what “confidence” defendants had “that the order strength that you’re seeing
7 reflects more than double ordering and an inventory refresh” – defendants placated the analysts by
8 assuring them they had “visibility” into true customer needs at that time because they were “very
9 close to our customers.” ¶¶82-83.

10 Furthermore, it is undisputed, defendants spoke to investors specifically about Oclaro’s
11 “order coverage.” *See Va. Bankshares*, 501 U.S. at 1091 (investors expect corporate executives have
12 knowledge and expertise about the company’s business far exceeding the normal investor). This
13 imposes a heightened duty on defendants to ensure they spoke accurately, rather than with deliberate
14 disregard as to the truth or falsity of their statements. “[O]nce defendants chose to tout” order
15 coverage figures – especially while refusing to provide actual order levels “they were bound to do so
16 in a manner that wouldn’t mislead investors.” *Berson*, 527 F.3d at 987; *see also In re Gilead Scis.*
17 *Sec. Litig.*, 536 F.3d 1049, 1052 (9th Cir. 2008) (omitting material facts when “highlighting” a
18 product’s “success made a true statement (that demand was strong) also a misleading one”).

19 Finally, and critically, FE1’s account *corroborates* FE2 in that both confirm, contrary to
20 defendants’ misleading message to the market, that “order coverage” did *not* represent firm orders
21 that had been placed by Oclaro customers and were subject to minimal risk of cancellation.

22 C. The TAC’s Additional Motive Allegations Further Support a Strong 23 Inference of Scienter

24 It is well-settled law that neither motive nor insider sales are required to allege scienter.
25 *Matrixx*, 131 S. Ct. at 1324; *see Diamond Foods*, 2012 U.S. Dist. LEXIS 170704, at *23 (the lack of
26 insider sales was “not dispositive” as to scienter).

27 Critically, however, insider trading rules apply equally to corporations offering securities for
28 profit and individuals who stand to gain personally. *WPP Lux. Gamma Three Sarl v. Spot Runner*,

1 *Inc.*, 655 F.3d 1039, 1056 (9th Cir. 2011) (“corporate issuer in possession of material nonpublic
 2 information, must, like other insiders in the same situation, disclose that information to its
 3 shareholders or refrain from trading with them” (citing *McCormick v. Fund Am. Cos.*, 26 F.3d
 4 869, 876 (9th Cir. 1994))), *cert. denied*, *U.S.*, 132 S. Ct. 2713 (2012); *Shaw v. Digital Equip.*
 5 *Corp.*, 82 F.3d 1194, 1204 (1st Cir. 1996) (corporate issuers may not engage in purchase or sale of
 6 its own securities while in possession of material non-public information, “[o]therwise, a corporate
 7 issuer selling its own securities would be left free to exploit its informational trading advantage, at
 8 the expense of investors, by delaying disclosure of material nonpublic negative news until after
 9 completion of the offering”). Thus, the corporate insider trading engaged in by the defendants with
 10 respect to Oclaro’s May 2010 Secondary Offering is equally probative of scienter as personal insider
 11 trading.

12 **IV. PLAINTIFFS RESPECTFULLY REQUEST LEAVE TO AMEND**

13 Should the Court find that the TAC fails to adequately allege scienter with respect to
 14 defendants’ July 29 and August 11, 2010 misstatements, plaintiffs respectfully request leave to
 15 amend to allege additional facts uncovered during their investigation and discovery, including but
 16 not limited to testimony corroborating FE1’s testimony that close relationships with customers did
 17 not provide customer demand.⁹

18 **V. CONCLUSION**

19 Because the TAC has alleged with the requisite specificity that defendants acted with scienter
 20 when making false and misleading statements on July 29 and August 11, 2010, plaintiffs respectfully
 21
 22
 23
 24

25
 26 ⁹ Although Mr. Haynes is not currently named as a defendant in the TAC, he may again be
 27 added as a defendant in this matter should it become necessary and appropriate in light of the facts
 28 and evidence. Defendants’ request for dismissal of Mr. Haynes with prejudice at this time should
 therefore be denied. See MTD at 14-15.

request the Court deny defendants' Motion in its entirety.

DATED: April 18, 2013

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
SHAWN A. WILLIAMS
SUNNY S. SARKIS

s/ Shawn A. Williams
SHAWN A. WILLIAMS

Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: 415/288-4545
415/288-4534 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
JULIE A. KEARNS
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

Lead Counsel for Plaintiffs

ROBERT M. CHEVERIE & ASSOCIATES
GREGORY S. CAMPORA
Commerce Center One
333 E. River Drive, Suite 101
East Hartford, CT 06108
Telephone: 860/290-9610
860/290-9611 (fax)

HOLZER HOLZER & FISTEL, LLC
MICHAEL I. FISTEL, JR.
200 Ashford Center North, Suite 300
Atlanta, GA 30338
Telephone: 770/392-0090
770/392-0029 (fax)

DYER & BERENS LLP
ROBERT J. DYER III
JEFFREY A. BERENS
303 East 17th Avenue, Suite 810
Denver, CO 80203
Telephone: 303/861-1764
303/395-0393 (fax)

Additional Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2013, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 18, 2013.

s/ Shawn A. Williams

SHAWN A. WILLIAMS

ROBBINS GELLER RUDMAN

& DOWD LLP

Post Montgomery Center

One Montgomery Street, Suite 1800

San Francisco, CA 94104

Telephone: 415/288-4545

415/288-4534 (fax)

E-mail:shawnw@rgrdlaw.com

Mailing Information for a Case 3:11-cv-02448-EMC

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Gidon M. Caine**
gidon.caine@alston.com,joe.tully@alston.com,kathy.kirk@alston.com,chuck.mattson@alston.com
- **Jessica Perry Corley**
jessica.corley@alston.com
- **Michael I. Fistel , Jr**
mfistel@holzerlaw.com
- **Frank James Johnson**
frankj@johnsonandweaver.com,paralegal@johnsonandweaver.com,shawnf@johnsonandweaver.com,Ceciliar@johnsonandweaver.com
- **Julie A. Kearns**
jkearns@rgrdlaw.com,e_file_sd@rgrdlaw.com,e_file_sf@rgrdlaw.com
- **Tina Mehr**
tina.mehr@alston.com
- **Brian O. O'Mara**
bo'mara@csgrr.com,e_file_sd@rgrdlaw.com,e_file_sf@rgrdlaw.com
- **Mark Punzalan**
markp@punzalanlaw.com,office@punzalanlaw.com
- **Darren Jay Robbins**
e_file_sd@rgrdlaw.com
- **Sunny September Sarkis**
Ssarkis@rgrdlaw.com
- **Andrew Townsend Sumner**
andy.sumner@alston.com
- **Joseph G Tully**
joe.tully@alston.com
- **David Conrad Walton**
davew@rgrdlaw.com
- **Shawn A. Williams**
shawnw@rgrdlaw.com,khuang@rgrdlaw.com,erinj@rgrdlaw.com,e_file_sd@rgrdlaw.com,e_file_sf@rgrdlaw.com

Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

Robert J. Dyer , III
Dyer & Berens LLP
303 East 17th Avenue, Suite 300
Denver, CO 80203